

UPDATE

News of Developments in the Financial Sector and Related Areas

* *IN THIS ISSUE* *

Loan Participations

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As bank regulatory agencies continue to focus and raise concerns about concentrations in commercial real estate, participations have declined. Other reasons for the decline in participations reflect the concerns of banks in general in shrinking their balance sheets and preserving their capital while also tightening underwriting standards and staying away from loans outside of their market because of a lack of control by the participant.

The banking industry continues to see loan portfolio problems particularly from loan participations made by multiple lenders to a single borrower. An originating bank will normally act as the lead bank and enlist other banks as participants in a loan. The originating bank deals directly with the borrower and will service and manage the loan.

Loan participations are useful in those situations when (i) a loan would otherwise be too large for the originating bank to handle by itself, (ii) participating banks in a slow market can team up with the originating bank to generate more income, (iii) participating banks can diversify their loan portfolio by reducing risks and diversifying in different communities and

geographic areas, (iv) the originating bank reduces its risk to the borrower and in a specific geographical area, and (v) the originating bank continues its relationship with the borrower through the servicing of the loan.

A loan participation, as distinguished from a multibank loan transaction, i.e., a syndicated loan, is an arrangement in which the originating bank makes a loan to a borrower, and then sells off a portion of the loan to one or more banks. All the documentation of the loan is drafted in the name of the originating bank and the participant's share of the loan is evidenced by a certificate which assigns an interest in the loan and any related collateral. This certificate is generally part of a loan participation agreement between the originating bank and one or more participants in the loan.

In order to constitute safe and sound banking practices, bank regulatory agencies require controls to be in place in connection with loan participation transactions to include (i) written lending policies and procedures, (ii) an independent analysis of the credit quality by the participant bank, (iii) agreement by the borrower to make full credit information available to the originating bank, (iv) agreement by the originating bank to provide available information on the borrower and maintenance of credit information by the participant bank, and (v) written documentation outlining the rights and obligations of each party to the transaction.

Written lending policies and procedures should include a complete analysis and documentation of the credit quality of the obligation to be purchased by the participant bank, an analysis of the value and lien status of the underlying collateral and the maintenance of full credit information on the borrower during the term of the loan.

A loan participant needs to obtain full credit information on a borrower before a loan participation is purchased in order to make an informed and independent evaluation of the credit. Once the purchase of the participation is made, the loan participant also needs timely credit information to monitor the status of the loan. Such information can often be obtained from the originating bank.

Loan participations are subject to the provisions of Financial Accounting Standard 140 ("FAS 140") which establishes the accounting treatment for both the originating bank and the participant bank. Loan participations are accounted for as sales under FAS 140 if (i) the participant's interest in the loan is isolated from the interest of the originating bank and is beyond the reach of the originating bank and its creditors, (ii) the participating bank must control the interest acquired with the right to pledge or exchange the interest, and (iii) the originating bank must not maintain effective control over the interest transferred to the participant bank such as the ability of the originating bank to cause the repurchase or redemption of the interest held by the participant bank before its maturity. In order to satisfy the criteria, the participant bank must not have any formal recourse with the originating bank.

In connection with the contractual terms of the loan participation agreement, matters need to be addressed such as the right of the originating bank without the prior consent of the loan participant to (i) make any amendment to the terms and conditions of the loan, (ii) waive or release any claim

against a borrower or a guarantor, (iii) make or consent to any release, substitution or exchange of collateral, (iv) accelerate payment under the loan, (v) commence any type of collection proceeding against the borrower or a guarantor or exercise any rights against the collateral securing the loan. In the event that there is more than one participant involved in the loan, the loan participation agreement needs to address the percentage of ownership, i.e., 100% of all interests or a lesser percentage of all interests, required to do any of the foregoing.

The loan participation agreement should include specific contractual provisions requiring loan participants to reimburse the originating bank in the event that the originating bank is required to disgorge any payments on the loan arising out of litigation by a bankruptcy trustee for a bankrupt borrower claiming that the loan payments were fraudulent or preferential transfers.

The Federal Deposit Insurance Corporation recently issued Advisory Letter FIL-49-2015 to ensure that loan and participation purchases are conducted in a safe and sound manner addressing practices as follows:

- Policy Guidelines for Purchased Loans and Participations
- Independent Credit and Collateral Analysis
- Profit Analysis Loan Purchase and Participation Agreements
- Ability to Transfer, Sell, or Assign an Interest
- Due Diligence of Third Parties
- Financial Reporting
- Audit
- Board Approval/Reporting
- Bank Secrecy Act/Anti-Money Laundering

Our firm has extensive experience and is available to assist and answer questions involving loan participation agreements.